IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 18TH DECEMBER 2007 / 27TH AGRAHAYANA 1929

SA.No. 285 of 1994(A)

AS.13/1990 of PRINCIPAL SUB COURT,KOCHI
OS.802/1987 ofADDL. MUNSIFF COURT, PERUMBAVOOR
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APPELLANTS: RESPONDENTS/DEFENDANTS
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1. THOMAS, S/O.CHOWRO, COOLY, RESIDING AT
S.D.P.Y. ROAD, PALLURUTHY, COCHIN-6.

2. PHILOMINA, W/O.THOMAS, RESIDING AT -DO-

BY ADV. SRI.SREELAL N.WARRIER
SRI.V.C.JOY

RESPONDENT:APPELLANT/PLAINTIFF

BERNADOSE, S/O.MATHAI, PAINTER
S.D.P.Y. ROAD, PALLURUTHY, COCHIN-6.

BY ADV. SRI.S.K.BRAHMANANDAN
SRI.G.S.PRABHU

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 18/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 285 OF 1994

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Dated this the 18th day of December, 2007

JUDGMENT

Defendants in O.S.802/1987 on the file of Munsiff Court, Cochin are the appellants. First appellant is the husband and second appellant his wife. Respondent is the plaintiff. Respondent instituted the suit seeking a decree for realisation of Rs.9782.85 being Rs.6,200/- borrowed and Rs.1640/- being the value of the gold ornaments borrowed which was agreed to be paid with interest, pursuant to a mediation culminated in execution of Ext.A1 agreement. Case of respondent was that second appellant is the cousin of the respondent and they are very close relatives. First appellant is her husband and the amount was borrowed and ornaments was obtained and when it was not repaid there was a mediation and Ext.A1 agreement was executed and as promised they did not pay the amount and therefore respondent is

entitled to realise the amount from both the appellants. Appellants resisted the suit contending that the amount as alleged was not borrowed and Ext.A1 agreement was not executed. It was contended that respondent helped appellants in purchasing the materials for construction of a house and amount was being entrusted with respondent and he was not prepared to settle the account and claiming that amount was due he filed false complaint before the Police and Police asked appellants to pay the amount and as per a settlement Rs.5800/- is due to the respondent and second appellant executed a mortgage deed in favour of respondent and on 18.4.1986 respondent executed an agreement waiving his right to claim interest on the mortgage amount and Ext.A1 is a forged document and respondent obtained Rs.600/- from second appellant and thereafter he explained inability to pay the amount and entrusted a pair of gold jimki weighing 3 grams and a pair of gold rings for the purpose of pledging and realising the amount and appellants are not liable to pay any amount. Before the trial court respondent was examined as

PW1 and Advocate Ramakrishnan was examined as PW2 to prove that Ext.A1 was prepared by him as instructed by respondent and first appellant and was executed by them in his presence. Appellants were examined as Dws.1 and 2. Ext.A1 on the side of the respondent and Exts.B1 to B4 on the side of appellants were marked. Learned Munsiff on the evidence held that apart from the evidence of PW2 other witnesses were not examined and therefore Ext.A1 is not proved. It was also found that no material was produced to prove that respondent was a member of the society and appellants are liable to pay the amount. Suit was dismissed. Appellants challenged the judgment before Sub Court,Kochi in A.S.13/1990. Before the first appellate court, the counsel appearing for appellants did not appear when the appeal was heard. Learned Sub Judge on hearing the appeal found that evidence of PW2 establish execution of Ext.A1 agreement and granted the decree. It is challenged in the second appeal.

2. The appeal was admitted formulating the following substantial questions of law.

1.Whether a document not executed by second appellant could be accepted as her acknowledgement of the liability.

2. Whether Ext.A1 agreement written on a plain white paper, which was not proved in accordance with law, could be accepted and a decree granted.

3. Learned counsel appearing for appellants and respondent were heard.

4. The argument of the learned counsel is that in Ext.A1 agreement second appellant is not a party at all and therefore first appellate court was not justified in granting a decree as against the second appellant. It was also argued that though PW2 was examined, there is no acceptable evidence to prove that Ext.A1 agreement was executed by first appellant and therefore finding of first appellate court is not sustainable. Learned counsel appearing for respondent argued

that Ext.A1 agreement was executed pursuant to a mediation and evidence of PW2, the Advocate establish that Ext.A1 prepared at his office as instructed by first appellant and respondent and both of them signed in Ext.A1 in his presence and execution of Ext.A1 was proved. It was therefore argued that finding of first appellate court is perfectly correct and warrants no interference.

4. Though trial court found that execution of Ext.A1 agreement was not proved, first appellate court relying on the evidence of PW2 found that Ext.A1 was executed by appellants and respondent and Ext.A1 acknowledges receipt of the amount promised to be paid and therefore granted the decree. As rightly argued by learned counsel appearing for appellants, second appellant is not a party to Ext.A1. Even if Ext.A1 is treated as acknowledgement of an existing liability, Ext.A1 does not show that any liability was created by the second appellant. On the other hand, the recital is that the amount was borrowed by first appellant. As the second appellant is not a party to Ext.A1, first appellate court was not justified

in granting a decree based on Ext.A1, as against second appellant. Therefore to that extent, the decree granted by first appellate court is not sustainable.

5. Though trial court found that Ext.A1 agreement was not proved, as rightly found by first appellate court, evidence of PW2 a practising lawyer establish that it was executed in his presence by both first appellant and respondent. Evidence of PW2 that he prepared Ext.A1 as instructed by first appellant and respondent and in his presence the liability was acknowledged and Ext.A1 was prepared and it was signed by both the parties in his presence. In the light of that evidence, finding of first appellate court that first appellant executed Ext.A1 agreement along with the respondent is perfectly correct and warrants no interference.

6. Ext.A1 therefore establishes that first appellant received the amount from the respondent as well as the gold ornaments and later in the mediation he agreed to pay the amount as shown in Ext.A1. In such circumstance, decree granted by

the first appelalte court, as against first appellant is perfectly correct and warrants no interefece.

In the result, appeal is allowed in part. The judgment in A.S.13/1990 on the file of Sub Court, Kochi is modified that respondent plaintiff is only entitled to get the decree as against the first defendant. Suit as against second plaintiff stand dismissed. No cost.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.285 /94

JUDGMENT

18th DECEMBER 2007